Filed 10/26/09 P. v. Alvarez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRED AARON ALVAREZ, Defendant and Appellant.	F055657 (Super. Ct. No. BF116978A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman and Louis P. Etcheverry, Judges.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Fred Aaron Alvarez stands convicted, following a jury trial, of premeditated murder in which he personally and intentionally discharged a firearm, causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) Following a

bifurcated court trial, he was found to have suffered two prior serious felony convictions (*id*., § 667, subd. (a)) that were also strikes (*id*., §§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and to have served two prior prison terms (*id*., § 667.5, subd. (b)). Sentenced to prison for a total of 100 years to life plus 10 years, he now appeals. For the reasons that follow, we will reject his various claims of error and affirm.

FACTS

I

PROSECUTION EVIDENCE

In November 2006, Cristal Cortez worked for Joe Delatorre as an exotic dancer. Prior to November 13, she became friends with appellant, whom she took to Delatorre's apartment. She introduced the two men, who talked about seeing whether appellant's company wanted to sponsor Delatorre's girls. The week before November 13, appellant took Cortez to Paso Robles to dance for his coworkers. Appellant expressed a desire to spend more time with her, as friends. On the way home, he told her that she could do better things, such as go to beauty school.

On Friday, November 10, Cortez went to a club with Delatorre and Elizabeth Santana, who was Delatorre's girlfriend and another of his exotic dancers. Cortez saw appellant in the club's parking lot, and went over to talk to him. Santana and Delatorre also walked over. Delatorre extended his hand in an attempt to shake hands with appellant, but, when appellant did not respond, Delatorre and Santana went on into the club. Cortez joined them a couple of minutes later. Appellant came in about 20 minutes after that, and he and Cortez talked for a while. Appellant expressed a desire to spend more time with Cortez, but she told appellant that she was not interested in him and that he needed to stop following her around. Appellant then left.

On Sunday night, November 12, Michael Suarez was alone at Delatorre's apartment when he heard the dog barking. When he walked outside to ask who it was, the man who was there walked away. Via the security monitor, Suarez saw him return.

He was Hispanic, at least six feet tall, and had a hood pulled up. The man looked up at the place and then walked by. A couple minutes later, Suarez saw what appeared to be a light-colored Monte Carlo drive by.

In November 2006, Don Perico's Mexican restaurant was located at the west end of a strip mall on Oswell, near Mall View, in Bakersfield. There was a Blockbuster video store at the opposite end of the mall, and a Supercuts toward the middle.

Shortly before 9:00 p.m. on Monday, November 13, Delatorre and a girl arrived at Don Perico's, sat down at a table, and placed an order. Around 9:00 p.m., Theresa Lopez was standing outside Don Perico's, smoking a cigarette, when she saw Delatorre come out of the restaurant, talking on a cell phone.[1] He walked up to a white Mercedes that was backed into a parking space just east of the restaurant entrance, and opened the trunk. Lopez then saw a man walking westbound through the parking lot, from the direction of Oswell. He walked along the passenger side of the Mercedes and came in contact with Delatorre, who had hung up his cell phone shortly after he came outside. Delatorre said "hey, what's up," and the other person asked where someone was. The two men seemed to know each other, and the conversation was friendly. Lopez looked the other direction, then suddenly heard four loud bangs she believed to be gunshots. As she turned back, Delatorre said, "what did I do to you," then he was on the ground. The other man stood there for a second. Scared, Lopez turned away as if not paying attention, then ran into the restaurant. By that time, the shooter was already gone.

Lopez, who was perhaps five to seven parking spaces away from Delatorre and the other man, did not get a good look at the shooter's face. He was Hispanic, tall with a medium build, had short hair, and was dressed all in black, including a black leather

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1 Cell phone records showed that at 9:01 p.m. on November 13, a one-minute call was made to Delatorre's cell phone from a cell phone number registered to appellant. The person who made the call likely was somewhere in the area of the cell tower closest to the restaurant.

jacket that went a little past his waist to his upper thighs. Lopez did not see a man in a white shirt anywhere near Delatorre and the shooter.

Jenna Taylor was working at Supercuts on the evening of November 13. The business closed at 9:00 p.m. Right around 9:05, she heard multiple gunshots that sounded as if they came from somewhere in the parking lot. Through the front window, Taylor saw a larger man walking eastbound through the parking lot, toward Oswell. He was either a light-skinned Hispanic or a dark-skinned Caucasian, close to six feet tall or perhaps a little taller, and with a good-sized build. Taylor was not able to see his face clearly. His pants were like a dark denim color, and he was wearing a jacket that appeared to be made out of a leather-type of material. It was black and extended down to his upper thighs. Taylor could see a lighter-colored shirt sticking out the top. It appeared to have a collar. Taylor believed the man to be in his late 20's or early 30's. He had short hair, worn in a fade style that was a little shorter on the sides and back than on top. She could not tell whether he had any facial hair. Taylor could only see him as far as partway down the parking lot, and did not see him get into a vehicle.

Shortly after 9:00 p.m., Alfredo Castruita, Jr., and his family arrived at Blockbuster Video and parked directly in front of the store. As he stepped out of the car, he heard what sounded like gunshots coming from the west end of the strip mall. A few seconds later, he saw a man coming from that direction, walking eastbound toward Oswell. Castruita was not able to get a good look at the man, but thought he might have a mustache. The man was either Hispanic or Caucasian, around 30 or 35 years old, about six feet tall, and approximately 200 pounds. His hair was black and close-cut. The man was wearing black pants and a black, thigh-length jacket. It appeared to be leather.

The man got into a newer model, two-door, silver Monte Carlo Super Sport, with a red SS on the rear passenger-side fender. Castruita did not recall seeing any customizations on the car, which was parked near his vehicle, but it did have tinted

windows. Castruita believed it also had a bra, although he was not certain. He did not see anyone else in the car, which exited the parking lot onto Oswell.

Delatorre was shot four times and died from multiple gunshot wounds. No shell casings were found at the scene, indicating a revolver was used.

Shortly after 4:00 a.m. on November 14, Captain Roy Stephenson of the Kern County Fire Department and his crew responded to a vehicle fire at Caliente and Bena Roads. It is a fairly desolate area, with the closest residence probably over a mile away. A vehicle sitting on the side of the road was fully involved. The firefighters extinguished the blaze, then notified their dispatcher to have the Highway Patrol (CHP) respond. Stephenson formed the opinion that the fire looked intentionally set because of the time of day, location, absence of anyone at the scene, and the way it was reported by a railroad crew as opposed to the car's owner. In addition, it appeared the fire started in the interior of the vehicle.

After extinguishing the fire, Stephenson found a license plate, No. 5UGB791, underneath the car's rear bumper. This is common in vehicle fires, as the heat will melt the plastic holding the license plate and it will just drop to the ground. By the time Stephenson found the license plate, a CHP officer was on the scene. Stephenson handed it over to him, and he ran the plate and gave Stephenson information concerning the vehicle and owner. Department of Motor Vehicles (DMV) records showed the registered owner of the 2002 Monte Carlo with that license plate number was appellant. Detective Mosley made some photographic comparisons to confirm the make, model, and year of the burned car. He used the Internet to pull up several vehicles, specifically the 2002 Chevrolet Monte Carlo, and compared that to the photographs of the burned vehicle. The vehicles were identical in terms of body style.

As of November 13, Manuela Alvarez was appellant's fiancée. At that time, appellant was driving a gray Monte Carlo SS. He had gotten it in May, and Alvarez had

gotten him a Dallas Cowboys license plate for it. In July, she got him a black bra for the front of the car. There were two cowboy hats on the speaker ledge by the back window.

Bakersfield Police Detectives Mosley and West interviewed Alvarez on November 20, and found her initially to be uncooperative. During the interview (a videotape of which was played for the jury), Alvarez said that on Monday, November 13, appellant got up and dressed for work. As per his regular routine, he turned on his gray Monte Carlo and left it running while he came back inside. This morning, he came back in and said his car was gone and that someone had taken it. Appellant did not call the police because he thought someone was playing a joke on him. Appellant kept his cell phone in the car, and it was taken along with the vehicle. Appellant remained at home all day and all that night. On Tuesday and Wednesday, appellant was in bed with a migraine. Alvarez took him to the hospital on Thursday. Appellant subsequently got a letter in the mail from a towing company, saying his vehicle had been found.

The detectives told Alvarez that they had evidence suggesting she was lying, and that if she was, she could be arrested as an accessory to murder. They also told her about appellant's trip to Paso Robles with Cortez. Eventually, Alvarez said that appellant left Monday night for a couple of hours, probably from around 8:00 or 8:30 to about 10:00 or 10:30. She did not know what car he used. He did not say where he was going, just that he would be back. When he left the house, he was wearing some blue pants and a blue checkered shirt. He was not wearing a jacket. He was wearing the same clothes when he returned. When he got home, he used the bathroom, washed his hands, changed to the shorts in which he slept, and then sat down and watched television. When she asked where he had gone, he did not answer, although in the morning he said the car was stolen. When she looked outside, the car was gone. Alvarez told appellant to call the police, and he said he would do it later on that morning. Alvarez did not remember appellant going anywhere on Tuesday, but on Wednesday, he left around 4:00 p.m. for about an hour, saying he had to go talk to his mother.

After detectives pressed further, Alvarez finally admitted she did not tell the truth in the beginning because she was scared. She related that appellant partied Sunday night. He had a couple of friends over. They were drinking at the house, then they left around 8:00 p.m. She went to sleep around midnight, and he returned after she was already asleep. When she asked him Sunday night if he was going to go to work, he said no. When she asked why, he said he just was not.

On Monday, Alvarez went about her business, getting her children to school and the like. Appellant stayed in bed. He was at home the whole morning, and the silver Monte Carlo SS was there the whole time. Around 2:00 p.m., appellant left. As usual when he was going somewhere, appellant did not tell her where. He returned about 5:30 or 6:00 p.m. By this time, he and she were mad at each other and were not talking because some girl kept calling him on his phone.

After appellant returned, Alvarez walked out of her room and opened the door to the other room. She saw appellant sitting on the couch with a blue towel on the floor. In the towel were two guns. One was square and looked like a nine-millimeter. The other was a revolver. She told him he knew better than to bring weapons into the house where the children were, and that he had 15 seconds to get rid of them. Appellant wrapped them back up in the towel, put them in a black bag, put them in the trunk of his car, and left.

Appellant returned around 8:00 p.m. and began taking his work stuff and everything out of the car. When Alvarez asked what he was doing, he did not answer. When she reminded him that he had to go to work the next day, he said he was not going to go to work anymore. She asked why; he responded that he was just not going to go back to work anymore. Then, after he was done cleaning out the car, he left again. He returned 30 to 45 minutes later and went into the bedroom. He got all dressed up, as if he was going to a party. He put on black dress shoes, charcoal gray pants, a dark sweater, and his black leather jacket that was long and hung down to his thighs. Alvarez asked

where he was going and said he was acting funny. She hugged him and said he was acting like he was never coming home. When she asked if he was going to leave her, he said he would never leave her and that he loved her. She begged him not to go, but he said he had to go and then he left in his car. He was alone. It was almost 10:00 when he returned. Alvarez was inside and did not know whether anyone was with him. When appellant came in, he was wearing only his boxers and his socks. She asked where his clothes were and what he did, but he did not answer and got in the shower. Alvarez looked outside; the car was not there. When appellant got out of the shower, he sat on the couch. She kept asking him where he went and what he did, but he would not answer. He just sat and watched television, and ended up falling asleep on the couch.

The next morning, Alvarez heard on the news that there had been a murder. Alvarez always watched the news in the morning, but now appellant was concerned about not missing it. When Alvarez asked what he did, appellant said he did not do anything. Alvarez had heard of Delatorre and that he was the owner of DLT Girls. The girls passed out flyers at car shows and stuff like that, and sometimes appellant would bring home a flyer. Appellant's daughter, who was in eighth grade at the time, was part of DLT Girls the year before. She once gave appellant a photograph of her and some of the other girls at a car show. They were sexily dressed. Appellant just glanced at the picture and said it was cool that she had been at a car show. Appellant was never angry with Delatorre, as he did not believe his daughter was ever actually working for Delatorre, one of whose bars was busted because underage girls were giving lap dances. Alvarez knew the daughter was working for Delatorre, but never told appellant that his daughter worked at the bar that got busted because she was trying to keep the girl's trust.

Alvarez and appellant never had any discussion about the car being stolen. When appellant received the letter from the towing company, he said they had found his car and it had been burned. He did not even look mad. On Thursday, it was appellant's idea to go to the hospital. He complained of headaches and being weak. The doctor at the

hospital said he had insomnia and job-related stress, and to take him to the mental hospital. His migraines continued there, and it was determined the cause was a cracked wisdom tooth.[2]

Mosley and West interviewed appellant while the latter was at Memorial Center, a form of hospital. Appellant was not under arrest. During the interview (an audio recording of which was played for the jury), appellant denied knowing Delatorre. When asked what kind of car he had, he responded that he had two, a 2002 Monte Carlo and a 1998 Dodge Stratus. Appellant said he had no recollection of the previous Monday through Friday, did not recall hearing about a shooting at Don Perico's, and did not know where the restaurant was. He denied being near the East Hills Mall on Monday; he had no business there. Appellant related that his car and cell phone were stolen from him on Monday morning, while he was getting ready to go to work. On Wednesday, he received a note in the mail from the CHP, saying his car had been found, burned. He did not report the car stolen because he figured it had been taken by one of the neighborhood kids and he did not want to send anyone through any kind of trouble. Appellant denied knowing an exotic dancer named Cristal; when asked whether he went to strip clubs or called exotic dancers for parties, appellant said he did not know where this was going and terminated the interview.

Shortly after, Mosley arrested appellant. Appellant was 36 years old; witness descriptions gave the suspect's age as early to mid 30's. Appellant weighed 200 pounds;

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[2] At trial, Alvarez testified that on the night of November 13, she and appellant were having a discussion about appellant's receiving telephone calls from a girl. Alvarez suspected appellant of being unfaithful. Because of her anger about this, Alvarez untruthfully told police that she saw appellant with two handguns wrapped in a towel and that he was gone from home for a while. In reality, she saw no guns, and appellant was there the whole night.

witness estimates of the suspect's weigh ranged from 200 to 230 pounds. Appellant was six feet tall, which matched the witnesses' statements.

Mosley did not show any of the eyewitnesses a lineup, and he did not believe they were shown a photographic lineup. Lopez and Taylor both testified at trial that they would not be able to identify the shooter. Castruita testified that he would "[p]robably not" be able to recognize the man if he saw him again.

Neither a weapon nor appellant's cell phone was ever found. Mosley, who personally looked at the burned car, did not see anything inside that could have been a gun or cell phone. No fingerprints belonging to appellant were found on Delatorre's Mercedes.

II

DEFENSE EVIDENCE

Anna Hernandez was with Delatorre at Don Perico's on the night he was shot. When he picked her up that evening, he said he was going to be meeting two men at the restaurant. When she and Delatorre arrived, Delatorre telephoned someone. After Hernandez and Delatorre were seated in the bar section and had placed their order, Delatorre received a telephone call and told her he would be back. He then left. About five minutes later, Hernandez heard gunshots.

In the early evening of November 13, Donald Herrera and his wife, Norma, were at the Sonic hamburger stand not far from Don Perico's when they heard five or six gunshots. As they drove through the Don Perico's parking lot to get out onto Oswell Street, Herrera saw a man walking southwest across the parking lot. He appeared to be a Hispanic in his mid to late 20's and of average size, perhaps five feet nine inches to five feet 10 inches tall. He was wearing dark trousers and a white T-shirt, and had medium-length dark hair. His pace was a little quicker than a leisurely walk, and he glanced back a couple of times. Herrera saw no one else in the parking lot other than Delatorre. Norma Herrera recalled the man being Hispanic, about five feet eight inches tall, with

short dark hair. The man had a rectangular face, and he was clean-shaven. He was wearing a white T-shirt, dark pants, and dark shoes, and looked to be in his early 20's. Mrs. Herrera estimated it took her and her husband a minute to get from their parking space at Sonic into the Don Perico's lot.

DISCUSSION

I

REQUEST FOR SUBSTITUTION OF COUNSEL

Prior to the preliminary hearing, appellant requested a substitution of his appointed attorney pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).[3] After the court closed the hearing and explained to appellant that anything he said would be confidential, the following took place:

> "THE COURT: So now, Mr. Alvarez, you requested that Mr. Carter be relieved as your attorney. Is that correct? You would like another lawyer to represent you?
>
> "THE DEFENDANT: Please.
>
> "THE COURT: All right. And do you feel that Mr. Carter has not properly represented you?
>
> "THE DEFENDANT: That is correct.
>
> "THE COURT: Okay. Can you tell me why you feel that way and please be specific.

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[3] Normally, errors occurring at or before the preliminary hearing constitute grounds for reversal only if the defendant demonstrates that the error resulted in denial of a fair trial or otherwise affected the judgment. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) The California Supreme Court appears to have assumed, without deciding, that this rule does not apply to claims, such as those brought under *Marsden*, that implicate the federal constitutional right to counsel. (*People v. Crandell* (1988) 46 Cal.3d 833, 855 & fn. 4, disapproved on other grounds in *People v. Crayton* (2002) 23 Cal.4th 346, 364-365; cf. *People v. Stanley* (2006) 39 Cal.4th 913, 929.) As the parties make the same assumption, so will we.

"THE DEFENDANT: The reason being I asked Mr. Carter on his one and only visit out to me at mini-max here at Lerdo to file a couple of motions formally.

"THE COURT: What kind of motions? What kind of motions?

"THE DEFENDANT: I asked for two specific motions, one motion was for a lineup and the other motion was for a waiver of preliminary hearing. Which he did not do. And I told him if he did not, I would file a Marsden motion because of being ineffective counsel."

After the court ascertained when the discussion occurred and appellant explained that he had previously been represented by the public defender's office and another attorney, and that both counsel had removed themselves due to a conflict of interest, this took place:

"THE DEFENDANT: … Now, I am having this Marsden hearing due to ineffectiveness of this counsel member here. [¶] … [¶] So my due process is really being affected here.

"THE COURT: Well, I'm not really too worried about your due process, that's very important, but the key to being represented in a criminal case between a lawyer and his client is how you feel and what kind of confidence you have. And my question is, up to – up to Monday [when the conversation at Lerdo took place] did you feel that he wasn't representing you prior to Monday because he just didn't come see you quick enough?

"THE DEFENDANT: Yes. I felt the same way when I – when I had obtained the counsel because we did have a chance to speak in court, as we did today. And I put on record with Mr. Carter that I wanted a formal waiver of my preliminary hearing admitted today and on record, which it has already been noted.

"THE COURT: What did he tell you about that, about that?

"THE DEFENDANT: He told me that he would not. He would not file any motions.

"THE COURT: Did he tell you why?

"THE DEFENDANT: He told me that he would not file them because he didn't feel that they were my best interest.

"THE COURT: All right. And did he tell you why it was in your best interest to go through a preliminary hearing?

"THE DEFENDANT: Yes. he did.

"THE COURT: And what did he tell you about that?

"THE DEFENDANT: I had told him that I understood his reasons."

The court and appellant then discussed the purpose of a preliminary hearing. When appellant said he wanted to file a motion for ongoing discovery in case discovery was being made without his knowledge, the court explained that there was already ongoing discovery and that nothing needed to be filed to obtain it. The court then asked appellant his reasons for not wanting to have a preliminary hearing. Appellant talked about "preserv[ing] witnesses" at trial, and this ensued:

"THE COURT: So the big thing that you had your problem with … was the fact that you want to waive your right to a preliminary hearing?

"THE DEFENDANT: Yes.

"THE COURT: The prosecutor jumped up and said they wanted to put on the preliminary hearing.

"THE DEFENDANT: Right. But my attorney had ample amount of time to have a formal motion noted for the record and to have, you know, presented to the court this morning, and which he failed to do.

"THE COURT: Well, I don't know that. Well, I'm going to ask him some questions.… [¶] But, anyway, Mr. Carter, you have heard his dissatisfaction in those areas. You want to respond to those, please."

Defense counsel then discussed what he had told appellant about waiving a preliminary hearing, and why counsel would prefer to have the hearing. In part, counsel stated: "I did try to explain that to him. We have also had discussions about – you know, tried to explain to him about the process. But he always wants to jump immediately to he just wants to waive preliminary hearing, go to motions and for me to take a bunch of motions for dismissal and that we have all we need in the police reports. And I tried to explain to him that we need to do investigations, that we need to have our investigator,

who's been out to talk to him on two separate occasions and has provided him with the police reports, that there is things that we need to do in preparation for the case. And that would be to our advantage to take the time and to do those things. That I was more concerned that he help me with the facts of the case and let me take care of the law end of it, that I was pretty familiar with the process. And that if he would help me do that, then I would try. That I would not always do what he wanted, but I would most certainly try to do what was in his best interest at all times."

The trial court agreed that there were many reasons appellant should go through the preliminary hearing, but decided that it would be appropriate to get a judicial determination with respect to waiver, especially since the prosecutor had stated she would not waive the prosecution's right to a preliminary hearing. This followed:

> "THE COURT: Here is what I'm going to do, … I don't find anything – in the problem that you are having with Mr. Carter, that I think I can correct quite easily, because I think he is a good lawyer and I think – I really am more persuaded by what he is telling me about the preliminary hearing. [¶] … [¶] Here is what I am going to do though, I'm going to deny the Marsden motion. However, I am going to, on this court's motion, allow – put on the court calendar for tomorrow … the motion by Mr. Alvarez to waive the preliminary hearing and let that court decide it. So you will get your day in court on that issue.… So, what we will do is indicate I've denied the Marsden motion. The court feels that there has been no sufficient showing made by Mr. Alvarez to relieve Mr. Carter.…
>
> "THE DEFENDANT: Up until this point I haven't had a chance to make any motions whatsoever.
>
> "THE COURT: Well, there's no motions usually made, many motions made, Mr. Alvarez, before the preliminary hearing.…"

Appellant now contends the trial court erred by denying his request for a new attorney. We disagree.

"When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation … the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate

performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

The record, quoted at length above, clearly shows the court permitted appellant to state his reasons for desiring new counsel. Appellant's reasons were very specific and concrete, and nothing suggests he had more reasons than those he identified for the court. (Contrast *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1665-1666 & fn. 8 [when defendant identified specific reasons for wanting new counsel but said they were only some of the grounds for his request, trial court erred by not inquiring into unstated reasons]; *People v. Munoz* (1974) 41 Cal.App.3d 62, 66 (*Munoz*) [where defendant accused his attorney of not wanting to defend him and said the attorney told him that he was guilty and did not have a chance, trial court erred by not inquiring into attorney's state of mind and attempting to ascertain in what particulars attorney was not providing competent defense].) That the court fully explored appellant's desire to waive his preliminary hearing, and not his request for a live lineup, does not mean appellant was not permitted to state his reasons for wanting new counsel or that the trial court erred under *Marsden* and its progeny. Appellant confirmed that the issue concerning the preliminary hearing waiver was the most important to him; moreover, it was clear he had spoken to defense counsel about both of the motions he wanted filed and that defense counsel had expressed his reasons for not acceding to appellant's demands. "Although the court could have inquired further into defendant's complaints …, the court's failure to do so did not amount to denying defendant an opportunity to enumerate specific

examples of inadequate representation. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 231.)

Nor was the court required to inquire of counsel concerning his reasons for refusing to move for a live lineup. Appellant himself stated the reason: Counsel did not believe it was in appellant's best interests. To our knowledge, the California Supreme Court has never required an inquiry of *counsel* when a motion for substitution of counsel has been made. (See *People v. Terrill* (1979) 98 Cal.App.3d 291, 299.) Indeed, that court has affirmed denial of a *Marsden* request even where such inquiry was not made. (*People v. Silva* (1988) 45 Cal.3d 604, 621-622.) We ourselves have not been silent on the subject, and have stated that "inquiry into the attorney's state of mind is required only in those situations in which a satisfactory explanation for counsel's conduct or attitude toward his client is necessary in order to determine whether counsel can provide adequate representation. Because many actions by a court-appointed attorney are justifiable, tactical decisions, it is not necessary for the trial judge to engage in a *Munoz* inquiry every time a defendant requests a substitution." (*People v. Penrod* (1980) 112 Cal.App.3d 738, 747, fn. omitted.) "[T]he *Munoz* inquiry becomes necessary only when a serious allegation by a defendant indicates that an attorney should provide an explanation for his conduct." (*Id.* at p. 747, fn. 2.)

In *People v. Turner* (1992) 7 Cal.App.4th 1214, the defendant requested new counsel, complaining that his attorney would not file a suppression motion, had only seen him on one occasion, and, the defendant believed, was on the district attorney's side. Defense counsel responded that there were no grounds upon which to file a suppression motion, and so he and the defendant had a conflict regarding whether it should be filed; however, he could adequately represent the defendant at trial. (*Id.* at p. 1218.) In affirming the trial court's denial of the substitution request, we rejected the defendant's claim the court had a duty to inquire further regarding counsel's reasons for not filing the suppression motion, stating: "Once the court ascertained counsel's belief there were no

grounds for a suppression motion, no further inquiry on that complaint was necessary. [¶] Moreover, a disagreement as to which motions should be filed is not sufficient reason to require substitution of counsel. [Citations.] Therefore, the 'conflict' between defendant and his counsel as to whether a suppression motion should be filed did not amount to a breakdown in the attorney-client relationship of such magnitude as to substantially impair defendant's right to effective assistance of counsel and to warrant the appointment of new counsel." (*Id*. at p. 1219.)

Turner is squarely on point. Here, the trial court ascertained, through appellant, that defense counsel believed a motion for a live lineup was not in appellant's best interests. No further inquiry was necessary.

A defendant has a due process right to a pretrial lineup upon request "*only* when eyewitness identification is shown to be a material issue *and* there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, italics added, fn. omitted.) As respondent points out, there were no eyewitness identifications in this case; hence, it is questionable whether appellant could have compelled a live lineup. In any event, "the decision of whether to demand a pretrial live lineup is a matter of trial tactics and strategy within counsel's authority to control, 'despite differences of opinion or even open objections from the defendant' [Citation.]" (*People v. Bolmdahl* (1993) 16 Cal.App.4th 1242, 1248.) Appellant's "specific complaints merely showed a disagreement as to tactics, not deficient performance. Disagreement concerning tactics, by itself, is insufficient to compel discharge of counsel" (*People v. Smith*, *supra*, 30 Cal.4th at p. 606; accord, *People v. Dickey* (2005) 35 Cal.4th 884, 922), and the record of the *Marsden* hearing fails to suggest that the disagreement was irreconcilable, signaled a complete breakdown in the attorney-client relationship, or was likely to result in ineffective representation (*People v. Earp* (1999) 20 Cal.4th 826, 876; *People v. Crandell*, *supra*, 46 Cal.3d at pp. 859-860). Accordingly, the trial court did not abuse its discretion in conducting the

inquiry into appellant's request for new counsel or in denying that request. (*People v. Earp, supra,* 20 Cal.4th at pp. 876-877; *People v. Turner, supra,* 7 Cal.App.4th at p. 1219.)

To the extent appellant is claiming counsel should have been removed because he was incompetent for not requesting a pretrial live lineup, that contention likewise has no merit. "To establish entitlement to relief for ineffective assistance of counsel, the burden is on the defendant to show (1) trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. [Citation.]" (*People v. Turner, supra,* 7 Cal.App.4th at p. 1219.) Appellant has not met either requirement. Defense counsel's obvious tactical strategy – to forgo any kind of procedure that might give rise to even a tentative identification, or might lead to an in-court identification simply because the witness had previously seen appellant at a lineup, in favor of being able to argue the clear lack of any identification to the jury – was eminently reasonable under the circumstances.

II

ADMISSION OF EVIDENCE CONCERNING THE BURNED CAR AND THE LICENSE PLATE

Appellant contends the prosecution failed to preserve, and improperly destroyed, the burned car and the license plate found nearby, and there was no foundation laid that the license plate was registered to appellant or that the burned vehicle was a Monte Carlo. Accordingly, he says, the trial court's erroneous admission of the evidence of the vehicle and license plate violated the confrontation clause of the Sixth Amendment to the United States Constitution, as well as appellant's right to due process.

A. Background

Appellant moved, in limine, to preclude the prosecutor from mentioning or introducing any evidence regarding the burned vehicle. He asserted the vehicle had been crushed and sold for scrap, and the license plate shredded, thereby depriving him of the

opportunity to test the plate for third party fingerprints and to check the condition and contents of the vehicle. He also moved for exclusion of the Kern County Fire Department's reports pertaining to identification of the vehicle and its owner, as being without proper foundation, speculation, and/or improper opinion, and to prevent anyone from referring to the burned vehicle as a Monte Carlo without proper foundation. The People opposed the motions, arguing that appellant had failed to show that the car had any apparent exculpatory value at the time of its destruction or that the police acted in bad faith. Appellant responded that the destruction was intentional – at best, an act of gross negligence – and deprived him of his right to confront and cross-examine his accusers because he now had no means to address issues such as whether there remained indicia pointing to the make of the car or identifying the owner, the evidence the fire was intentionally set, where the license plate was found, and whether there were unexplained prints or marks on the plate.

During argument on the motion, the prosecutor conceded the crushing and shredding were improper, but argued the "oversight" did not warrant exclusion of the entire line of evidence. Defense counsel countered that, although the car was photographed after it was moved to the impound yard, the license plate, which was not attached to the car, was not photographed, and there was nothing connecting the plate to the car other than close proximity, since the car's VIN was completely destroyed. Defense counsel asserted: "So basically, what we have going is kind of a circular argument. We found this license plate; it must be connected to this car. This car is connected to this crime because we have this license plate that we found out there. [¶] But our point now is that … because they destroyed the license plates and there are no photographs of the license plates, we're deprived of the opportunity to properly cross-examine about how the license plate got wherever it was, whether or not it had been touched by persons other than those we would expect to have touched it, … you know, if it had been a stolen car and somebody who stole the car took the license plates off, we

would perhaps expect to find some kind of evidence of that. We're deprived of that opportunity. [¶] And so what we're left with is this burned car, which is really unidentifiable by anybody, and we have a destroyed license plate, which they're telling us was attached to this car. [¶] So we are unable to, basically, conduct a meaningful cross-examination about what happened to this car because of the destruction of this evidence."

An Evidence Code[4] section 402 hearing was held. At the hearing, Detective Mosley testified that, in the course of his investigation into Delatorre's murder, he became aware of a burned vehicle being located on Bena Road a little after 4:00 a.m. on November 14, 2006. The fire was reported by a passerby on a freight train, and both the fire department and CHP responded. Fire Captain Stephenson informed Mosley and West that he had located a license plate on the ground underneath the fender, and that, after the fire was extinguished, the license plate was placed in the vehicle. Stephenson explained to the detectives that license plates are often found directly below a burning car because the plastic license plate holder will melt in the course of the fire, causing the license plate to fall to the ground.

At 4:20 a.m., after the fire was extinguished, the vehicle was towed, at CHP's direction, to Golden Empire Towing. CHP's impound report directed the tow yard to store the vehicle, which as of that point had not been identified as being of interest in the murder investigation.

At 9:10 a.m., after appellant was identified as a suspect in the murder and upon learning that appellant's car had been taken to Golden Empire Towing's tow yard, Mosley contacted the tow yard by telephone and told a female administrator that the vehicle was part of a murder investigation, not to destroy it, and to place it in a location in which it would not be contaminated. Mosley did not send any kind of written notice to

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4 Further statutory references are to the Evidence Code unless otherwise stated.

the tow yard. However, he personally went there about noon. He made contact at the administrative office (which was approximately one-half to three-quarters of a mile from the storage yard to which the vehicle had been towed), identified himself, and informed them that the vehicle needed to be held in the course of a murder investigation. He was then directed to the vehicle's location, where he met the driver who had actually towed the car.

Normally, evidence at a scene would be tagged for later identification and, if it was something Mosley did not want touched, it would be taped off. Mosley did not tag the vehicle or place any crime scene tape around it because it was in a long-term storage lot, and both the tow driver and the administrative people told Mosley that it would not be a problem, for preservation of the evidence, to leave the vehicle in the fenced, locked yard.

Mosley, West and lab supervisor Cathy Kibbey went to the tow yard two days later, on November 16, upon service of the search warrant to process the vehicle. Mosley never personally saw a license plate; there was no license plate on either November 14 or 16. However, the vehicle was photographed, then Kibbey and the detectives went through the burned debris located on the floorboard areas, seized some for analysis, and did an overall examination of the car. Mosley got the license plate number from the fire department's report.

Within three months prior to the hearing date (Dec. 5, 2007), Mosley learned that, on January 21, 2007, the vehicle was mistakenly released to another salvage yard and destroyed. To the best of Mosley's knowledge, no one from the Bakersfield Police Department ordered the vehicle destroyed. The police department's written procedure concerning evidence in murder cases is to preserve all such evidence until adjudication of the cases. Mosley believed he contacted the records department and placed an investigative hold on the vehicle. The records department should have made an appropriate entry, so that, assuming someone from the tow yard called and said they

wanted to get rid of the vehicle, the hold would not have been released without the lead investigator – in this case, Mosley – being notified and releasing the hold. Police department records showed that the hold was, in fact, placed at 11:59 a.m. on November 14, 2006.

At the conclusion of the hearing, defense counsel argued that the failure of the police to tag the license plate and tape off the vehicle amounted to gross negligence. Counsel argued that he had not even had a chance to look at this evidence, so that he could not proceed with any additional investigation that might be appropriate. Although there were photographs of the vehicle, they showed only a frame, and there was no opportunity to look for indicia of ownership or whether it really was a 2002 Monte Carlo. Counsel argued that the fire department lacked the foundation and expertise to determine whether the license plate went with the car, and the destruction of the evidence prevented the defense from questioning the assumption that the vehicle was a Monte Carlo belonging to appellant and matching the license plate.

As an offer of proof, the prosecutor asserted that Stephenson would testify that he and two other firefighters responded to a report of a vehicle fire; that the fire was extinguished; and that Stephenson located the license plate underneath the fender, a common situation in vehicle fires. Stephenson put it in the vehicle. CHP and Golden Empire Towing were contacted, and the vehicle was moved to the Golden Empire tow yard. The prosecutor argued that neither the vehicle nor the license plate had apparent exculpatory value before they were destroyed, and that no bad faith on the part of law enforcement could be shown.

Defense counsel responded that the problem went beyond a due process argument and implicated the Sixth Amendment's confrontation clause. He argued that the appropriate remedy, for both due process and confrontation clause purposes, was to permit the prosecution to present evidence that a witness saw a car resembling a Monte Carlo, and that appellant owned a Monte Carlo. Counsel argued that the prosecution

should not be allowed to present further evidence that that car was found burned because (1) the proper foundation had not been laid, and (2) the defense would be unable to sufficiently cross-examine, given what happened to the evidence.

The trial court found no bad faith or gross negligence on the part of the Bakersfield Police Department. The court further found there was no exculpatory value that would have been apparent before the evidence was destroyed. Accordingly, the court denied appellant's in limine motions, but warned that the People would need to lay an appropriate foundation and also present testimony from someone who could indicate that the vehicle was, in fact, a Chevrolet or a Monte Carlo.

The prosecutor subsequently called Captain Stephenson to address a foundational issue that had been raised concerning his background and qualifications with request to fire origin issues. Stephenson testified, in part, that the vehicle was fully engulfed when he and his crew arrived, and that all of the plastic and interior were gone. When the court asked whether he found anything identifying the make and ownership of the vehicle, Stephenson explained that the normal course was to look for a license plate, which usually would be on the ground right underneath the car because the plastic tabs used to affix it to the vehicle would have melted. In this case, Stephenson found a rear license plate lying underneath the rear bumper. CHP was on the scene; as per his usual custom, he showed the plate to the officer, then the officer ran the plate and determined the make, model, and owner of the vehicle. Stephenson personally gave the plate to the CHP officer, who ran the number, and then Stephenson put the plate in the vehicle. He believed he tossed it into the passenger compartment. Stephenson could tell from the styling of the front and rear ends that the vehicle was a General Motors product, but that was all. He relied on CHP to tell him the year and model of the car. As a result, the portion of Stephenson's report that identified the car as a 2002 Chevrolet Monte Carlo, with a certain license plate and VIN, was information received from CHP.

In the course of arguing whether Stephenson would be permitted to testify the fire was intentionally set, defense counsel noted that the portion of Stephenson's report containing the vehicle information was hearsay, and that, until a foundation was laid, he did not want the jury to be presented with the unredacted report. The court agreed that the information was hearsay, and that CHP would have to authenticate it. The court said: "With adequate foundation, though, by the CHP that they were handed at the scene a license plate from beneath a vehicle by the fire captain and they ran a check, we could take judicial knowledge [*sic*] of the fact that there's a performance of an official duty if it came within their computer-based system as to the identification of the vehicle, what the registration showed from that license plate –"

In front of the jury, Stephenson testified that after the fire was extinguished, he found a license plate on the ground right underneath the rear bumper; that this was common in vehicle fires; that he noted the license plate number in his report; and that the license plate number was 5UGB791. Stephenson further testified that CHP was on the scene by then, and Stephenson handed the plate to the CHP officer, who ran the plate. Stephenson got the information, and took the plate and put it back in the vehicle. He then left the scene. Without objection, the prosecutor subsequently proffered exhibit No. 12, a certified DMV printout identifying appellant as the registered owner of a 2002 Monte Carlo with the license plate number recovered by Stephenson.

The prosecutor subsequently asked Detective Mosley whether he had looked at the burned car and made some photographic comparisons to confirm the make, model, and year. When Mosley said he had, the prosecutor asked what sort of car it was. Defense counsel's objection, based on lack of foundation and expertise, was sustained. The prosecutor then elicited that Mosley "looked at the Internet and … pulled up several vehicles, specifically the 2002 Chevrolet Monte Carlo, and … compared that to the photographs of the suspect's vehicle, the burned vehicle, and … came to a conclusion." The photographs of the Chevrolet Monte Carle were identical, in terms of body style, to

the burned vehicle. Defense counsel subsequently asked the court to strike the testimony as contrary to the court's ruling that Mosley had no expertise, but the court stated it was more of a lay identification issue, and that the foundation was adequately laid for Mosley to identify the vehicle based upon his looking at Internet photographs.

B. Failure to Preserve Evidence

"Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (*California v. Trombetta, supra,* 467 U.S. at p. 489; *People v. Beeler, supra,* 9 Cal.4th at p. 976.) The state's responsibility is further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) In such case, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' (*Id*. at p. 58; accord, *People v. Beeler, supra,* 9 Cal.4th at p. 976.)" (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510.)

"On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. [Citation.]" (*People v. Roybal, supra,* 19 Cal.4th at p. 510.) We conclude such evidence existed here. Neither the car nor the license plate possessed an apparent exculpatory value before they were destroyed. At most, appellant might have been able to subject them to some sort of testing or examination that may have bolstered his claim

the car was stolen. Since the evidence did not establish bad faith on the part of the police, however, this was insufficient to establish a due process violation. (See *People v. Farnam* (2002) 28 Cal.4th 107, 166-167.)

Appellant argues that the issue was not merely one of due process, but a violation of his Sixth Amendment right to cross-examine the prosecution's witnesses. We see no such violation, even assuming appellant's Sixth Amendment right is somehow separate from, or greater than, his due process rights where the preservation of evidence is concerned. (See *People v. Arias* (1996) 13 Cal.4th 92, 165.) It is sheer speculation to assume that having access to the physical evidence would have permitted appellant to "conduct a meaningful cross-examination about what happened to" the car, or that it would somehow have given the jury a significantly different impression of Stephenson's credibility or the evidence linking the car to appellant. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.)

C. Foundation

Appellant says evidence of the license plate and its number was relevant only if the license plate was connected to the burned vehicle and registered to appellant, and that there was no foundation laid that the license plate found near the burned vehicle was registered to appellant. As a result, he concludes, the evidence should not have been admitted. We disagree.

"When, as here, the relevance of proffered evidence depends upon the existence of a foundational fact, the proffered evidence is inadmissible unless the trial court determines it 'is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence.' [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 165; § 403, subd. (a)(1).) "In other words … there [must] be sufficient evidence to enable a reasonable jury to conclude that it is more probable that the fact exists than it does not. [Citations.]" (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) The trial

court's ruling on the sufficiency of the foundational evidence is reviewed for abuse of discretion. (*People v. Tafoya, supra*, 42 Cal.4th at p. 165.)

Here, Stephenson testified to finding the license plate and its number. The prosecutor then proffered, without objection, a certified copy of a DMV record establishing appellant as the registered owner of a 2002 Monte Carlo with that license plate number. The evidence apparently was proffered under section 1280[5]; if appellant believed the evidence did not fall within the statutory provisions, it was incumbent upon him specifically to object, as his in limine motion was insufficient for this purpose. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1049, revd. on other grounds *sub nom*. *Stansbury v. California* (1994) 511 U.S. 318.)[6]

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5 Section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

6 The United States Supreme Court recently held that affidavits reporting the results of forensic analysis showing material seized by police and connected to the defendant was cocaine, were "testimonial" within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); hence, their admission violated the defendant's confrontation rights under the Sixth Amendment, absent a showing the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, ___ - ___ [129 S.Ct. 2527, 2530-2532].) As *Crawford* itself recognizes, however, business records are not, by their nature, testimonial. (*Crawford, supra*, 541 U.S. at p. 56; see *Melendez-Diaz v. Massachusetts, supra*, 129 S.Ct. at p. 2532, fn. 1.) The evidence here fell within the official records exception to the hearsay rule. (§ 1280; see *People v. George* (1994) 30 Cal.App.4th 262, 274.) Most official records are like business records "in that they are prepared to provide a chronicle of some act or event relating to the public employee's duty." (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225.) When, as in the case of the DMV record here, they are not "produced to be used in a potential criminal trial or to determine whether criminal charges should issue," "they are subject to the same analysis as business records and would not constitute 'testimonial statements.'" (*Ibid*.)

The trial court's statement requiring testimony by a CHP officer that he or she was handed a license plate at the scene that was determined to be registered to appellant, was made in response to defense counsel's objection to inclusion of the information concerning the car in the version of Stephenson's report to be presented to the jury. It did not preclude the prosecutor from linking the license plate to appellant in another manner, which the prosecutor did by presenting Stephenson's testimony and the DMV record. Nothing more was needed and, as the prosecutor was not seeking to lay a foundation for the information contained in Stephenson's report, the trial court's ruling was not violated. Contrary to appellant's apparent claim, the prosecutor was not required to present evidence corroborating Stephenson's testimony concerning the number of the license plate he found or why he concluded it had been connected to the burned vehicle. Appellant was entitled to cross-examine Stephenson on those subjects, and nothing precluded him from doing so.

The trial court also acted within its broad discretion by permitting Mosley to give a lay opinion concerning the make and model of the burned vehicle. (See *People v. Farnam, supra,* 28 Cal.4th at pp. 153-154; *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608-1609.) "A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. [Citation.]" (*People v. Farnam, supra,* 28 Cal.4th at p. 153; § 800.) Purported limits on Mosley's research or the types of vehicles whose photographs he viewed went to his testimony's weight, not its admissibility, and appellant was free to place before the jury the inability of others who viewed the burned car to determine its make and model.

To summarize, admission of evidence concerning the car and license plate was not error under state law, and did not violate appellant's due process or confrontation rights or lower the prosecution's burden.

III

CALCRIM No. 362

Based on statements appellant made when interviewed by Mosley and West, the trial court instructed the jury pursuant to CALCRIM No. 362, to wit: "If the defendant made a false or misleading statement regarding the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance; however, evidence that the defendant made such a statement cannot prove guilt by itself." Appellant now contends the instruction is an "impermissible argumentative prosecution pinpoint instruction."

As appellant acknowledges, the California Supreme Court has upheld CALJIC No. 2.03 as a proper instruction.[7] (*People v. Kelly* (1992) 1 Cal.4th 495, 531-532.) The high court has consistently and repeatedly adhered to this view in the face of the arguments appellant now makes. (E.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1019; *People v. Rundle* (2008) 43 Cal.4th 76, 152, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Howard* (2008) 42 Cal.4th 1000, 1024-1025; *People v. Bonilla* (2007) 41 Cal.4th 313, 329-330; *People v. Stitely* (2005) 35 Cal.4th 514, 555; *People v. Benavides* (2005) 35 Cal.4th 69, 99-100; *People v. Holloway* (2004) 33 Cal.4th 96, 142; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224; *People v. Medina* (1995) 11 Cal.4th 694, 762; *People v. Turner* (1994) 8 Cal.4th 137, 202, overruled on other grounds in *People v.*

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[7] CALJIC No. 2.03 reads: "If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Griffin (2004) 33 Cal.4th 536, 555, fn. 5.) We are bound to follow Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As there is no practical difference between CALJIC No. 2.03 and CALCRIM No. 362 (see *People v. Howard, supra,* 42 Cal.4th at pp. 1024-1025) – something appellant further acknowledges – we agree with the Third District Court of Appeal's conclusion, in *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103-1104, that CALCRIM No. 362 is a proper instruction.

We recognize that "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.) This does not mean, however, that the giving of CALCRIM No. 362 in the instant case was constitutionally infirm. (See *People v. Turner, supra,* 8 Cal.4th at p. 202.) Our statement in *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103-1104, though addressing CALJIC No. 2.03, is equally applicable to CALCRIM No. 362: "The giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. The falsity of a defendant's pretrial statement may be shown by other evidence even when the pretrial statement is not inconsistent with defendant's testimony [or, by analogy, his defense] at trial. The trial court is required to instruct the jury on applicable principles of law. When testimony is properly admitted from which an inference of a consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony. CALJIC No. 2.03 is a correct statement of the law; that it may single out defendant is not a determinative factor." (See also *People v. Jurado* (1981) 115 Cal.App.3d 470, 495-496.)

Deliberately false statements by a defendant about matters materially related to his or her guilt or innocence "have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances. [Citation.] Moreover, permitting the jury to drawn an inference of wrongdoing from a

false statement is as much a traditional feature of the adversarial fact finding process as impeachment by prior inconsistent statements. [Citations.]" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1167-1168.) Indeed, "[t]he inference of consciousness of guilt from willful falsehood … is one supported by common sense, which many jurors are likely to indulge even without an instruction. In this case, such circumstantial evidence of consciousness of guilt … would certainly have been argued – properly – by the prosecutor even without the challenged instructions. To highlight this circumstantial evidence in the course of cautioning the jury against overreliance on it was not unfair to defendant." (*People v. Holloway, supra,* 33 Cal.4th at p. 142; see also *People v. Jackson, supra,* 13 Cal.4th at p. 1224; *People v. Kelly, supra,* 1 Cal.4th at p. 531.)

There was no instructional error here.

DISPOSITION

The judgment is affirmed.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Vartabedian, J.

_____
Kane, J.